Before: Judge Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

ABOSEDRA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON AN APPLICATION FOR SUSPENSION OF ACTION

Counsel for applicant:
Esther Shamash, OSLA

Counsel for respondent:
Steven Dietrich, ALS/OHRM

Introduction

1. On 9 December 2010, the Applicant, a staff member of the United Nations Economic and Social Commission for Western Asia ("ESCWA"), requested management evaluation and suspension of the decision not to renew his fixed-term appointment. On 14 December 2010, the Under-Secretary-General for Management informed the Applicant that the Secretary-General had decided not to grant his request for suspension of action.[1]

2. Consequently, on 23 December 2010, the Applicant filed an application for suspension of action with the United Nations Dispute Tribunal ("the Tribunal").[2] On 24 December 2010, the application and Order No. 246 were served on the Respondent. By Order No. 246, the Tribunal granted the application for suspension of action until 14 January 2010 to allow the Respondent an opportunity to file his response and any relevant documentary evidence. By Order No. 003, dated 13 January 2011, the Tribunal further extended the suspension of action until 28 January 2011 pending a review of the Respondent's submissions and a final determination on the application.

3. The Respondent submitted his response on 14 January 2011 and on 20 and 24 January 2011, the Tribunal held hearings on the application for suspension of action.

Relevant facts

4. The Applicant was appointed to the post of Regional Advisor at the L-5 level at ESCWA on 16 February 2009. On 23 December 2009, he was offered a fixed-term appointment at the P-5 level with an expiry date of 31 December 2010.

[1] Pursuant to staff rule 11.3(b)(ii), in cases involving separation from service, a staff member may opt to first request the Secretary-General to suspend the implementation of the decision until the management evaluation has .3(n)6(een cted4(l)43(b)-)2(np(l)43((uat)3t)3.tuat)3t tuatle(aff32(nag8(7(e)-e)2(nt)-4(b)-)2(nb(l)43

discussion due to the time shortage, there had to be a discussion with Mr. Abosedra, if there was a concern about his performance".

8. By an email dated 21 July 2010, the Chief, Human Resources Management Service ("HRMS"), ESCWA, informed Mr. Safwat that the Applicant had brought to their attention that there was an error in the evaluation by Mr. Laurenti regarding the number of missions he had completed. HRMS further informed Mr. Safwat that he would have to request that the ePAS be "rolled back" to the "Start end of cycle – SM" phase in order to correct the error. By an email dated 18 August 2010, Mr. Safwat requested that the ePAS Helpdesk roll back the Applicant's ePAS.

9. On 18 October 2010, the Applicant lodged a harassment and discrimination complaint with the Director of Administrative Services Division ("D/ASD"), ESCWA, against Mr. Laurenti. Thereafter, the Executive Secretary, ESCWA, appointed a panel to investigate and report to her on the Applicant's complaint.

10. By a memorandum dated 2 December 2010, the D/ASD informed the Applicant of the outcome of the investigation into his complaint. The Applicant was informed that the Fact-Finding Investigation Panel had concluded that there was no improper conduct of harassment and discrimination as defined by ST/SGB/2008/5 but there was an absence of communication and inaccessibility of Mr. Laurenti to the Applicant. The D/ASD further informed the Applicant that the Executive Secretary had endorsed the findings of the Panel and had decided to close the matter. Consequently, no further action would be taken on the matter.

11. By an email dated 3 December 2010, Mr. Laurenti informed the D/ASD that the Applicant's post would be re-advertised in the near future and that this was linked to the proposed restructuring of the EDGD. He informed the D/ASD that "[t]he new TORs will be forwarded to you as soon as the orientation of the dicto [*sic*] restructuring gets clearer", and that the Applicant should be advised that his contract would be allowed to expire on 31 December 2010.

a decision[5]. In the same case it was held that the obligation to give a reasoned decision to justify the non renewal of a contract derives from *an implication or principle of law*.

24. The Tribunal considers that the contested decision is *prima facie* unlawful for two reasons: the provision of a false reason and retaliation.

Providing a false reason

25. The Respondent stated that the reason for allowing the contract to expire was justified by the need to restructure the department where the Applicant was posted. The idea of restructuring was first mooted in October 2010 by the Acting Director of EDGD, Mr. Tarik Alami[6], when the new Executive Secretary of ESCWA came on board. During the hearing, the Tribunal posed the following question to the Acting Director of EDGD, Mr. Tarik Alami:

> "So, if I have understood you correctly Mr. Alami, you are telling this Tribunal that in regard to such an important issue about the restructure of a division that deals with economic issues in the Arab world and that motivated the termination of the contract of a staff member, or somebody who was occupying a position, all that took place with regard to vision, restructure, etc., was never recorded in writing. There are absolutely no minutes, nothing to reflect what took place? Is this what you are telling the Tribunal?"

26. In response, Mr. Alami told the Tribunal that, "[…] regarding the restructure itself, other than the [terms of reference] of all the recruitment in my division, no". He also informed the Tribunal that:

[5] ILOAT Judgment No. 675, In re *Perez de Castillo* (1985).
[6] Mr. Alami became Acting Director of EDGD in October 2010.

> "Well, I don't have anything in writing to the new Executive Secretary but I have discussed with her during our first meeting as well as during several meetings about my vision regarding, the restructure of the division and she is very much aware of this but in writing, no. I do not have anything in writing prior to my meeting with her."

27. Subsequent to the hearings, the Respondent submitted to the Tribunal, on a confidential basis, three power-point presentations and draft vacancy announcements (terms of reference for posts in EDGD) that were supposed to substantiate the restructuring claim. The Tribunal found all three documents to be of no value to the discussion at hand as they merely provided information on the structure, work plan/program, major outputs and achievements, administrative issues and programme budget for 2012-2013. While there was a section on EDGD's way forward, this merely explained a new three-track strategy that EDGD planned to adopt in relation to monitoring and assessment of the struct

29. During cross-examination, Mr. Laurenti told the Tribunal that the restructuring was "in the process". He confirmed, however, that before any restructuring took place, the Executive Secretary would have to approve it. When asked if such an approval would be in writing, he told the Tribunal that he did not know. When asked whether a decision had been made on restructuring, he told the Tribunal that he did not know. When asked if the restructuring of EDGD was still in the "realm of a proposed change" i.e. that it had not yet been decided on as of 3 December 2010 when he communicated to the D/ASD the decision to allow the Applicant's contract to expire, he responded that he "did not know if it was under the process". The Tribunal finds it disturbing and very strange that a person in the position of Mr. Laurenti who was in charge amongst other matters of the budget could afford to remain content with answers amounting to "I don't know" on material issues. A classic example of his "I don't know" answer is when he invoked a situation akin to selective amnesia to the question as to whether the restructuring had been decided yet.

30. Based on the evidence adduced during the hearing, it is apparent that when the Applicant was informed of the non-renewal of his fixed-term appointment on 6 December 2010, the restructuring of EDGD was nothing more than an embryo with months to go before it could be deemed as a fully developed and viable option upon which critical decisions, such as the non-renewal of a staff member's contract, could be based. Thus, it is highly questionable that while EDGD/PPTCD was merely supposed to "**think over**" and provide proposals to the Executive Secretary on a "new vision" for the division during ESCWA's retreat, which took place on 8 & 9 December 2010, the decision not to renew the Applicant's contract based on a proposed restructuring of EDGD was taken on or before 3 December 2010, **before** any such proposal was even presented to the Executive Director at the ESCWA retreat for her approval or disapproval.

investigate his complaint. On 25 November 2010, Mr. Laurenti sent the following email to the various division heads, including Mr. Alami:

> "Grateful if you could provide PPTCD with a brief assessment on the performance of the [Regional Adviser]

there was an absence of communication and inaccessibility on his part. There is no doubt that Mr. Laurenti's strategic use of Mr. Alami's hazy restructuring plan to attain the non-renewal of the Applicant's appointment was retaliatory in nature.

47. The Tribunal agrees with the Applicant that even though the fact-finding panel concluded that no harassment had occurred, this does not detract from the fact that he had, in good faith, lodged a formal complaint according to ST/SGB/2008/5, and that he had a right to be protected against retaliation. It is appropriate to note here that Article 6.5 of ST/SGB/2008/5 enjoins the head of department to take appropriate monitoring measures following the outcome of an investigation to ensure that retaliation does not take place. In blatant disregard of this important rule Mr. Laurenti assisted by Mr. Alami, decided to get rid of the Applicant by using a non-existent restructuring exercise. It is to be wondered whether Mr. Laurenti and Mr. Alami were acting as rational managers or were exercising their power not to the benefit of the unit where they belonged but rather to satisfy their own personal goals and egos.

48. Based on the available evidence, the Tribunal finds, in accordance with Article 2 of the Statute of the United Nations Dispute Tribunal and Article 13 of the Tribunal's Rules of Procedure, that the Respondent's decision not to renew the Applicant's fixed-term appointment is *prima facie* unlawful having been motivated by false representation in regard to a non-existent restructure and retaliatory measures. Thus, the Applicant has met his burden of proof in this respect.

b) Particular urgency

49. The Respondent submits that the matter is not of "particular urgency" given that the Tribunal granted the application for suspension of action until 28 January 2011, which effectively extended the Applicant's contract beyond 31 December 2010. This is a rather myopic argument since the Tribunal did not grant the suspension of action indefinitely. The underlying issue, non-renewal of the Applicant's fixed-term appointment, remains the same. In light of the fact that the application for suspension of action was granted until 28 January 2011 and there are

just a few hours left before the contested decision is implemented, the Tribunal considers that this is a matter of "particular urgency".

c) Irreparable damage

50. Generally, an interim measure should not be granted in a case where damages can adequately compensate an Applicant, if he is successful on the substantive case. As noted by the Respondent, in *Utkina* the Tribunal held that:

> "there are many instances when the Tribunal will be able to fully compensate for any harm to professional reputation and career prospects should the applicant pursue a substantive appeal and should the Tribunal decide in [his] favour".[7]

51. However, *Utkina*

country, expects, if he makes good, to make a career in the service. If this expectation were not held and encouraged, the flow to the Organization of the best candidates would be diminished. If, on the other hand, every officer automatically failed to report for duty after the last day of a fixed term, the functioning of the Organization would, at least temporarily, be upset. This is the type of situation which calls for -- and in practice invariably receives -- a decision taken in advance. It was not the application of abstract theory but an understanding of what was practical and necessary for the functioning of an Organization that caused the Tribunal to adopt the principle that a contract of employment for a fixed term carries within it the expectation by the staff member of renewal and places upon the Organization the obligation to consider whether or not it is in the interests of the Organization that that expectation should be fulfilled and to make a decision accordingly".

53. The Tribunal notes that it has previously held that:

> "[m]onetary compensation should not be allowed to be used as a cloak to shield what may appear to be a blatant and unfair procedure in a decision-making process…An employer who is circumventing its own procedures ought not to be able to get away with the argument that the payment of damages would be sufficient to cover his own wrongdoing".[9]

54. Consequently, monetary compensation alone in the face of the blatantly unlawful decision-making process used by ESCWA would not begin to do justice to the Applicant. Under the circumstances of this case, the Tribunal finds therefore that implementation of the contested decision would cause the Applicant irreparable damage.

[9] *Tadonki* UNDT/2009/016.

Conclusion

55. The Applicant has satisfied all three elements under Article 13 of the Tribunal's Rules of Procedure for a suspension of action.

Decision

56. Rule 11.2 of the new Staff Rules[10] provides that:

> "A staff member wishing to formally contest an administrative decision alleging non compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision".

57. Article 2.2 of the Statute of the United Nations Dispute Tribunal provides that:

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> decision that is the subject of an ongoing management evaluation, where the decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage".

59. It would appear that under Article 2.2 of the Statute adopted by the Member States and the Rules of Procedure the duration of the management evaluation is subject to the outcome of the management evaluation. In other words if the Tribunal, as an independent judicial body, has found an administrative decision to be unlawful and capable of causing irreparable damage the suspension order which is in the nature of a judicial interim order, the purpose of which is to maintain the status quo between parties until the case is determined on its merits, ceases to have effect once the Management Evaluation Unit (MEU) files its conclusions irrespective of the nature of the outcome of its decision. Admittedly if the MEU confirms the decision of the Tribunal there will be an issue pending between the staff member and management. But if the MEU finds that there was no flaw in the administrative decision it means that the staff member is out of his/her job notwithstanding a judicial order for suspension. In other words by a stroke of the pen the MEU, an administrative body, is empowered to nullify a judicial order in regard to its duration.

60. It is true that in the case of *Kasmani v the Secretary General*[11] the United Nations Appeals Tribunal ("the Appeals Tribunal") has held that the Dispute Tribunal is limited by the powers conferred upon it by the Statute and that the Dispute Tribunal has no power to order the suspension of action beyond the pendency of a management evaluation. With due deference to the Appeals Tribunal, the Tribunal considers that notwithstanding of a rule it is its duty to consider whether that rule is in conformity with general principles of law. The Redesign Panel established by the General Assembly[12] was fully alive to the weaknesses of the internal justice prevailing before the new system came into operation on 1 July 2009 and strongly criticized it in its report presented to the General Assembly[13],

[11] Kasmani 2010-UNAT-011.
[12] General Assembly Resolution A/Res/59/283.
[13] Redesign Panel Report, A/RES/61/205, 28 July 2006.

> "…the United Nations internal justice system is outmoded, dysfunctional and ineffective and that it lacks independence…"
>
> "Effective Reform of the United Nations cannot happen without an efficient, independent and well resourced internal justice system that will safeguard the rights of staff members and ensure the effective accountability of managers and staff members".

61. Article 2.2 as it stands would be against the general principle of law relating to the independence of the judiciary. By making the Administration the judge of the duration of the management evaluation the Article is thereby curtailing the power conferred on the Tribunal to decide in its wisdom the duration of the suspension. General principles of law have been applied in a number of cases in spite of the existence of rules when it was considered that these rules were not in conformity with basic fundamental principles of the rule of law[14].

62. Consequently, the suspension will remain in force until the case is finally determined on its merits if the Applicant is minded to pursue the matter further. The Applicant will, however, have to file an application on the substantive issue of the expiry of his contract within the delay provided for by law. If he fails to do so within the prescribed delay, the order for suspension will lapse automatically.

[14] See generally the discussion on general principles of law by C.F. Amerasinghe, in *Principles of the Institutional Law of International Organizations* (Cambridge, 2007), Second Edition, pages 288-299.

(Signed)
Judge Vinod Boolell